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Water Quality
Control Commission
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STATE OF NEW MEXICO
NEW MEXICO WATER QUALITY CONTROL COMMISSION

In the Matter of:
PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTATE WATERS, 20.6.4 NMAC

No. WQCC 20-51 (R)

AMIGOS BRAVOS' MOTION TO STRIKE LANL'S PROPOSED AMENDMENT TO 20.6.4.14.A NMAC AND LANL'S MISPRESENTATION OF AN EPA REGULATION

Pursuant to 20.1.6.207.C NMAC, Amigos Bravos moves to strike the proposal of Triad National Security, LLC, and the United States Department of Energy (collectively referred to as "Los Alamos National Laboratory" or "LANL") to amend 20.6.4.14.A NMAC and its reference in paragraph 111 of its Proposed Statement of Reasons misquoting a regulation from the U.S. Environmental Protection Agency ("EPA"). As grounds for this motion, Amigos Bravos states:

1. For the first time, LANL submitted proposed language to amend 20.6.4.14.A NMAC, relating to sampling and analysis for pollutants, in its post-hearing brief filed September 24, 2021. *See* LANL's Proposed Final Amendments to 20.6.4 NMAC at 7-8.

2. Any amendment to 20.6.4 NMAC adopted by the Commission must be supported by "substantial evidence." NMSA 1978, § 7-6-7.B(2).

3. In this case, LANL presented no evidence in support of its late-filed amendment.

4. Furthermore, the other parties had no opportunity to cross-examine LANL witnesses on the meaning and effect of its amendment. *C.f.*, NMSA 1978, § 76-6-6.D (all interested persons have reasonable opportunity to examine witnesses at Water Quality Control Commission ("Commission") rulemaking hearing).

5. LANL's late-filed amendment therefore should not be considered by the Commission and should be struck.

6. In paragraph 111 of its Proposed Statement of Reasons, LANL misquotes an EPA regulation at 40 C.F.R. § 122.44(i)(1)(iv).

7. LANL claims that the regulation at issue:

> . . . provides that each NPDES [National Pollutant Discharge Elimination System] permit includes requirements to monitor compliance with effluent limitations "[a]ccording to test procedures approved under Part 136 for the analyses of pollutants having approved methods under that part, and according to a test procedure specified in the permit for pollutants with no approved methods."

8. However, LANL misquotes the regulation. *See* 40 CFR § 122.44(i)(1)(iv) [Ex. B at 6-7].

9. LANL misquoted this same regulation in the direct testimony of its witness John Toll. Amigos Bravos' counsel pointed out the error to Mr. Toll during cross-examination, who conceded he probably misquoted the regulation. 3 Tr. 785:13- 786:1, 787:19-25.

10. LANL's misrepresentation of the EPA regulation is material because it goes to the heart of a dispute between Amigos Bravos and LANL as to whether EPA regulations require the use of sampling methods in 40 CFR Part 136 ("Part 136 Methods") for purposes of compliance with state water quality standards and federal permits or whether a state can select a non-Part 136 Method for compliance if a Part 136 Method is not available.

11. Because the misrepresentation is material and LANL was on notice that it had incorrectly cited the regulation LANL's reference to the regulation in paragraph 111 of its Proposed Statement of Reasons should be struck.

12. Pursuant to 20.6.1.307.C NMAC, Amigos Bravos' counsel contacted LANL counsel, who opposes this motion.

13. Pursuant to 20.6.1.307.C NMAC, a memorandum in support accompanies this motion.

MEMORANDUM IN SUPPORT

Background

The New Mexico Environment Department ("NMED") filed its Petition in this proceeding on August 19, 2020, and filed an Amended Petition on March 12, 2021. NMED did not propose to amend 20.6.4.14 NMAC in either petition. *See* Amended Petition at 18-19.

On May 3, 2021, LANL, along with the other parties in this matter, filed its Notice of Intent to Present to Technical Testimony ("Direct NOI"). In that Direct NOI, LANL proposed the following amendment to 20.6.4.14.A NMAC:

> **20.6.4.14 SAMPLING AND ANALYSIS:**
> **A.** 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. In all other cases, sampling ~~Sampling~~ and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards: . . . .[1]

[1] 20.6.4.14.A NMAC provides in full:

> **20.6.4.14 SAMPLING AND ANALYSIS:**
> **A.** Sampling and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards:
> **(1)** "*Guidelines Establishing Test Procedures For The Analysis Of Pollutants Under The Clean Water Act*," 40 CFR Part 136 or any test procedure approved or accepted by EPA using procedures provided in 40 CFR Parts 136.3(d), 136.4, and 136.5;
> **(2)** *Standard Methods For The Examination Of Water And Wastewater*, latest edition, American public health association;
> **(3)** *Methods For Chemical Analysis Of Water And Waste*, and other methods published by EPA office of research and development or office of water;
> **(4)** *Techniques Of Water Resource Investigations Of The U.S. Geological Survey*;
> **(5)** *Annual Book Of ASTM Standards*: volumes 11.01 and 11.02, water (I) and (II), latest edition, ASTM international;
> **(6)** *Federal Register*, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations;

LANL Ex. 1 at 12. LANL justified restricting sampling methods to Part 136 Methods claiming that EPA regulations **require** states to use Part 136 Methods for compliance with federal permits. *See* LANL Ex. 7 at 3, 6-9 [Toll testimony]. If no Part 136 Method applies to a "pollutant" or "pollutant parameter", LANL took the position states' option is to obtain approval for an "alternative test procedure" or "ATP," *id.* at 6-7, an exceedingly onerous process. *See* 40 CFR §§ 136.4, 136.5.

In NMED's Notice of Intent to Present Rebuttal Testimony ("Rebuttal NOI"), NMED opposed LANL's proposed amendment to 20.6.4.14.A NMAC on substantive grounds and on the ground that NMED had not proposed any amendments to 20.6.4.14 NMAC and therefore LANL's proposed amendment was not a logical outgrowth of NMED's Petition. NMED Ex. 106 at 5, 7-9.

In Amigos Bravos' Rebuttal NOI, Amigos Bravos opposed the amendment on the ground that allowing only Part 136 Methods would result in ineffective monitoring for polychlorinated biphenyls ("PCBs") and no monitoring for per- and polyfluoroalkyl substances ("PFAS"). *See generally* Amigos Bravos Exs. 19, 20 and Ex. 17 at 5-7.[2]

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(7) *National Handbook Of Recommended Methods For Water-Data Acquisition*, latest edition, prepared cooperatively by agencies of the United States government under the sponsorship of the U.S. geological survey; or

(8) *Federal Register*, latest methods published for monitoring pursuant to the Safe Drinking Water Act regulations.

[2] This is because the Part 136 Method to test for PCB's, EPA Method 608.3, is not sufficiently sensitive to detect PCBs at certain of the Commission's numeric water quality standards, but a non-Part 136 Method that is approved by EPA's Office of Water, EPA Method 1668C, the congener method, is sufficiently sensitive, and because there is no Part 136 Method to test for PFAS, but there are methods to test for PFAS including EPA Method 537.1, approved by EPA's Office of Research and Development. *See generally* Amigos Bravos' Exs. 19, 20 and Ex. 17 at 5-7.

In its Rebuttal NOI, LANL continued to press for its amendment to require Part 136 Methods for compliance purposes, LANL Ex. 57 at 13, and continued to press its claim that EPA regulations **require** use of Part 136 Methods for compliance purposes, LANL Ex. 63 at 15 [Toll testimony].

During the hearing, Amigos Bravos conducted an extensive cross-examination of Mr. Toll on this point, pointing out that Mr. Toll (a non-lawyer) had misquoted the EPA regulations upon which he relied and that his own exhibits demonstrated states may use non-Part 136 Methods if there is no Part 136 Method. *See* 3 Tr. 778:22-797:5. Specifically, EPA regulations at 40 CFR § 122.44(i)(2)(B) provide:

> (B) **In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136** or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, **monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters.**

(Emphasis added.) In addition, a note to 40 CFR § 122.44 (i)(1)(iv)(A) expressly provides that, "Where no other EPA-approved methods exist, the Director should select a method consistent with 40 CFR 122.44(i)(1)(iv)(B)." Nonetheless, despite all evidence to the contrary, Mr. Toll continued to maintain that states are required to use Part 136 Methods or, if no Part 136 Method is available, states may seek approval for an ATP. *See* 3 Tr. 778:22-797:5.

On September 24, 2021, LANL, along with the other parties, filed its Closing Argument and Proposed Statement of Reasons in this matter. For the first time in this lengthy proceeding, LANL proposed new language for 20.6.4.14.A NMAC:

> **20.6.4.14 SAMPLING AND ANALYSIS:**
> **A.** 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. **In cases of pollutants for which there are no approved methods under 40 CFR Part 136, analyses shall be conducted according to a test procedure specified in the applicable permit or 401**

> **certification.** Where 40 CFR Part 136 approved methods are not required, sampling ~~Sampling~~ and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards: . . . .

LANL's Proposed Final Amendments at 7-8 (emphasis added).

LANL's late-filed language appears to incorporate EPA regulations that authorize states to use a non-Part 136 Method if no Part 136 Method exists, but LANL's new language is actually ambiguous, as discussed below.

In support of its new language, LANL cites to the testimony of Mr. Toll at 3 Tr. 771:20-772:4, 777:6-16, 766:7-13, 808:6-11. LANL Closing Argument at 47-48; LANL Proposed Stmnt. of Reasons, ¶¶ 107, 109. All these transcript references are attached as Exhibit A with the relevant testimony of Mr. Toll highlighted.

A review of Mr. Toll's testimony cited in support demonstrates that there is **nothing** in his testimony that supports LANL's late-filed language. Instead, Mr. Toll maintains in the testimony cited to that states may only use a Part 136 Method for compliance purposes or, if no Part 136 Method exists, an ATP approved by EPA. *See* 3 Tr. 771:21-23, 777:6-12 [Ex. A].

Argument

I. LANL'S LATE-FILED AMENDMENT TO 20.4.6.14.A NMAC SHOULD BE STRUCK

A. LANL Presented No Evidence in Support of Its Late-Filed Amendment

For the first time in this proceeding, LANL proposes language to amend 20.6.4.14.A NMAC that appears to allow states to use non-Part 136 Methods for compliance purposes if there is no Part 136 Method. However, the evidence in support of this new language cited by LANL does not support that proposition. In fact, the evidence cited by LANL supports the

opposite: that states **must** use Part 136 Methods for compliance purposes (and may apply for an ATP if no Part 136 Method exists).

Furthermore, there is **no evidence** in the record in support of the specific language now proposes: "In cases of pollutants for which there are no approved methods under 40 CFR Part 136, analyses shall be conducted according to a test procedure specified in the applicable permit or 401 certification." No LANL witness put forth this language during the hearing. Therefore, there is no witness testimony that supports this specific language.

Any amendment to 20.6.4 NMAC adopted by the Commission must be supported by "substantial evidence." NMSA 1978, § 7-6-7.B(2). In this case, LANL presented **no evidence** in support of its newly proposed amendment. Therefore, the Commission should not consider the late-filed proposal and it should be struck.

B. LANL's Late-filed Amendment Prevents Other Parties from Cross-Examining LANL Witnesses

Moreover, LANL's new language is ambiguous and highly problematic. First, the language does not expressly state that the "test procedure specified in the applicable permit or 40 certification" may be used to determine compliance with the Commission's water quality standards or Section 401 certifications. LANL continues to maintain in its post-hearing brief that it proposes "to require use of Part 136 approved methods for NPDES compliance determinations and CWA Section 401 state certifications." LANL Closing Argument at 45-46; LANL Proposed Stmnt. of Reasons, ¶ 102. Therefore, it is not clear from LANL's proposed language or its post-hearing brief whether it intends that non-Part 136 Methods could in fact be used for compliance determinations.

Second, LANL's new language allows non-Part 136 Methods to be used "[i]n cases of **pollutants** for which there are no approved methods under 40 CFR Part 136 . . . ." (Emphasis

added.) EPA's regulations, however, allow non-Part 136 Methods to be used "[i]n the case of pollutants **or pollutant parameters** for which there are no approved methods under 40 CFR part 136 . . . ." 40 CFR § 122.44(i)(1)(iv)(B). The use of the term "pollutant parameters" is critical, and it appears that LANL may have intentionally left this term out of its proposal.

"Pollutant parameters" could include specific numeric water quality standards in state regulations. For example, the Commission's numeric water quality standard for PCB's is 0.014 micrograms per liter ("µg/L") for wildlife habitat and aquatic life chronic and 0.0064 µg/L for aquatic life human health-organism only. 20.6.4.900.J NMAC. As Amigos Bravos' laboratory experts David Hope and Ann Bailey detailed in their testimony, the method detection limit for the Part 136 Method to test for PCBs, EPA Method 608.3, which tests for aroclors, is 0.065 µg/L, and therefore cannot detect PCBs at the Commission's standards for wildlife habitat, aquatic life chronic, and aquatic life human health-organism. However, the detection limit for EPA Method 1668C, which tests for congeners and is approved by the EPA Office of Water but not by Part 136, is 7 - 77 **picograms per liter** or 0.000007 - 0.000077 µg/L, one to two orders of magnitude lower than the Commission's lowest standard of 0.00064 µg/L. *See* Amigos Bravos' Stmnt. of Reasons, ¶¶ 129-132. Therefore, it appears that LANL's new proposal could prohibit NMED from requiring LANL to use EPA Method 1668C to monitor for PCBs for compliance purposes.[3]

While the language is ambiguous and problematic, because LANL put on no witness in support of this language, the other parties had no opportunity to cross-examine LANL witnesses

[3] LANL's omission of the term "pollutant parameters" may be intentional because in its new proposal LANL used EPA's language from 40 CFR 122.44(i)(1)(iv)(B), which refers to "pollutants or pollutant parameters" and LANL used the term "pollutant parameter" elsewhere in its proposed amendments. *See* LANL's Proposed Final Amendments to 20.6.4 NAMC at 20.6.4.7.S(5), -12.E NMAC.

as to its meaning and specifically whether non-Part 136 Methods could be used for compliance purposes, the reason LANL omitted the term "pollutant parameter", and the effect of that omission on allowable methods for sampling under LANL's new proposal. It is fundamentally unfair to allow LANL to introduce new language without giving the other parties an opportunity to cross-examine any witness as to its meaning and effect, and this proposal should be struck. *C.f.,* NMSA 1978, § 76-6-6.D (all interested persons have reasonable opportunity to examine witnesses at Commission rulemaking hearing).

II. LANL'S MISREPRESENTATION OF AN EPA REGULATION SHOULD BE STRUCK

As described above, in Mr. Toll's direct testimony, he purported to quote an EPA regulation for the proposition that states are required to use Part 136 Methods for compliance purposes. Mr. Toll claimed:

> EPA's regulations implementing Sections 401 and 304(h) of the CWA provide in 40 CFR 122.44 that each NPDES permit includes requirements to monitor compliance with effluent limitations "[a]ccording to ***test procedures approved under Part 136*** for the analyses of pollutants having approved methods under that part, and according to a test procedure specified in the permit for pollutants with no approved methods." 40 CFR 122.44(i)(l)(iv) (emphasis added).

LANL Ex. 7 at 6, ll. 9-14. During cross-examination by Amigos Bravos' counsel, Mr. Toll was shown a copy of the regulation he cited, 20 CFR § 122.44(i)(1)(iv), which was NMED Exhibit 112, and he conceded that he had probably misquoted the language quoted above. 3 Tr. 785:13-786:1, 787:19-25.

In fact, a review of that regulation, attached as Exhibit B and highlighted, demonstrates that Mr. Toll did misquote the regulations and demonstrates that the regulation provides for the

opposite of what Mr. Toll had represented. The regulation in question makes it clear **two times** that, if no Part 136 Method exists, the state may select a non-Part 136 Method.[4]

During cross-examination, Amigos Bravos' counsel acknowledged at the time that these type of mistakes happen. 3 Tr. 788:5-6. However, in LANL's Proposed Statement of Reasons, LANL continues to misquote the regulation, claiming:

> Section 304(h) of the CWA requires EPA to promulgate the analytical methods that regulated entities must use when analyzing the chemical properties of environmental samples for reporting under the NPDES permit program. LANL Ex. 7 at 6 (Toll Direct). **40 C.F.R. 122.44(i)(1)(iv) provides that each NPDES permit includes requirements to monitor compliance with effluent limitations "[a]ccording to test procedures approved under Part 136 for the analyses of pollutants having approved methods under that part**, and according to a test procedure specified in the permit for pollutants with no approved methods." *Id*. at 6.

LANL Proposed Stmnt. of Reasons, ¶ 111. This allegation is demonstrably inaccurate, and represents material misrepresentation of the regulation that goes to the heart of the dispute between Amigos Bravos and LANL which is whether EPA regulations require the use of Part 136 Methods for purposes of compliance or whether a state can select a non-Part 136 Method for compliance if a Part 136 Method is not available. EPA's regulations at 40 CFR § 122.44(i)(1)(iv) are clear on that point, and LANL's continued misquoting of that regulation should be struck.

Conclusion

For the foregoing reasons, Amigos Bravos respectfully requests that LANL's proposed amendment to 20.6.4.14.A NMAC be struck and that LANL's misrepresentation of EPA regulation 40 CFR § 122.44(i)(1)(iv) in its Proposed Statement of Reasons, ¶ 111, be struck.

[4] 40 CFR § 122.44(i)(1)(iv)(B) states in part, "In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 . . . ." The note to 40 CFR 122.44(i)(1)(iv)(A) states in part, "Where no other EPA-approved methods exist, the Director should select a method consistent with 40 CFR 122.44(i)(1)(iv)(B)."

Respectfully submitted,

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Certificate of Service

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STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

No. WQCC 20-51(R)

In the Matter of:

PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE AND
INTRASTATE SURFACE WATERS,
20.6.4 NMAC

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 15th day of July, 2021, this matter came on for hearing before GREGORY CHAKALIAN, Hearing Officer, virtually through Cisco Webex Meetings video conferencing, at the hour of 8:00 a.m.

Volume 3

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The three issues are, first, I proposed changes to 20.6.4.12E to require the use of 40 CFR Part 136 approved methods as required by federal law. The proposed changes would incorporate the 40 CFR 122.44 definitions of lowest minimum level and sufficiently sensitive method into the water quality standards.

And the provisions of 20.6.4.12 NMAC specifically apply to determining compliance for enforcement purposes. And so that is the context in which my proposed amendment would apply. Part 136 methods are not required for everything, but they are required when they exist to determine compliance for permit applications and reporting.

My second issue that I address is I propose changing 20.6.4.14A to state that 40 CFR Part 136 approved methods shall be used to determine compliance with the New Mexico water quality standards and in Section 401 certifications consistent with federal Clean Water Act requirements.

And issue number three, I propose changes to 20.6.4.7S to define the term "sufficiently sensitive" as it is defined in 40 CFR 122.44.(i)(1)(iv)(A).

Q. Dr. Toll, could you please summarize your rebuttal testimony?

A. There were five rebuttals of my direct -- five

NPDES applicants and permittees to use sufficiently sensitive EPA-approved analytical methods when quantifying the presence of pollutants in a discharge and require the director to require and accept only such data.

Ms. Lemon argued, and I'm going to quote her testimony, there are approximately 18 pollutants or pollutant parameters under 20.6.4 NMAC that do not have EPA-approved methods under 40 CFR Section 136. In other words, the list of pollutants with EPA-approved methods under 40 CFR Section 136 is much shorter and not equivalent to the list of pollutants with numeric criteria under 20.6.4.900 NMAC that are established at levels that protect human health and aquatic life.

Yet Triad and DOE NNSA are proposing to restrict analytical methods used for permit compliance in Clean Water Act Section 401 and state certifications to those approved by EPA under 40 CFR Part 136 for the measured pollutant or pollutant parameter.

But that testimony inaccurately characterizes what LANL is proposing. EPA and NMED can require the use of Alternative Test Procedures for analytes for which no Part 136 approved method exists. And these have been referenced in Ms. Lemon's testimony previously, that lists a set of methods that have been

approved by the State of New Mexico when no Part 136 approved method exists. So there's no contradiction between my testimony and the ability of the Department to require the use of those methods.

EPA and NMED can require the use of ATPs for analytes with Part 136 approved methods, too, but there's a process to go through if you want to do that. The process is to file an application with EPA Region 6 for limited use approval, and that -- that application has to be approved in accordance with 40 CFR Section 136.5, and an EPA Region 6 Alternative Test Procedure coordinator has to verify that requirements for establishing equivalence performance at Section 136.6(b)(2)(i) have been met.

Q. With respect to Ms. Conn's rebuttal testimony, could you respond to that, please?

A. Sure. First, Ms. Conn's prefiled rebuttal testimony was based on her opinion about what authority states should have, not what authority states do have. Ms. Conn's testimony asserts NMED's authority to require the use of EPA Method 1668C for PCB compliance monitoring in its 401 certifications. She infers that this has been established by precedent. And it is true that Region 6 has made decisions that seem to contradict 40 CFR 136.

Q. With respect to Ms. Sanchez' testimony, could you respond to that?

A. Sure. Ms. Sanchez testified that she understands that EPA has no Part 136 approved analytical method for PFAS. That is correct.

Ms. Sanchez also testified that based on her understanding of my testimony if the Triad-DOE proposed amendment to 20.6.4.12E NMAC and 20.6.4.14A NMAC are adopted, LANL would not be required to monitor for PFAS. That is a misunderstanding of my testimony. ATPs, Alternative Test Procedures, may be used for analytes that have no Part 136 analytical method. So the question of whether or not LANL will be required to monitor for PFAS is not collected -- not connected -- excuse me -- to LANL's proposed amendments to 20.6.4.12E NMAC and 20.6.4.14A NMAC.

Q. With respect to the testimony on LANL's proposal, did -- as a result of that testimony, are you proposing any changes to the draft rules?

A. No.

MR. ROSE: That completes my examination, Mr. Hearing Officer, and would tender Dr. Toll for cross-examination.

HEARING OFFICER CHAKALIAN: Are there any other witnesses that you are presenting on this issue?

REDIRECT EXAMINATION

BY MR. ROSE:

Q. Dr. Toll, in your cross-examination you talked about particularly with PCBs Part 136 approved methods and the sensitivity.

Is it your understanding that the language you've proposed is required by federal law?

A. Yes.

Q. And are you merely trying to include in the rules what you believe is already applicable?

A. Yes.

MR. ROSE: I have no further questions.

HEARING OFFICER CHAKALIAN: Do you want to call your next witness?

MR. ROSE: We can do that. He's here and -- we have to switch out here shortly, but if you'll give us a minute, we can certainly do that.

HEARING OFFICER CHAKALIAN: Ms. Jones, do we have any members of the public who would like to make a comment?

MS. JONES: No, sir.

HEARING OFFICER CHAKALIAN: Thank you.

(Proceedings in brief recess.)

HEARING OFFICER CHAKALIAN: We're ready, Ms. Olson, when you are.

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Title 40: Protection of Environment

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

§122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see §123.25).

In addition to the conditions established under §122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) *Technology-based effluent limitations and standards* based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with §125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of §122.29(d) (protection period).

(2) *Monitoring waivers for certain guideline-listed pollutants.* (i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) *Other effluent limitations and standards* under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also §122.41(a).

(2) *Standards for sewage sludge use or disposal* under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) *Reopener clause:* For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an

applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(*1*) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(*2*) The fact sheet required by §124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(*3*) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(*4*) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of §124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* and section 511 of the CWA, when EPA is the permit issuing authority. (See §122.29(c)).

(e) *Technology-based controls for toxic pollutants.* Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under §124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under §122.21(g)(7) or in a notification under §122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under §125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by §125.3(c).

(f) *Notification level.* A "notification level" which exceeds the notification level of §122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under §125.3(c)

(g) *Twenty-four hour reporting.* Pollutants for which the permittee must report violations of maximum daily discharge limitations under §122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) *Durations* for permits, as set forth in §122.46.

(i) *Monitoring requirements.* In addition to §122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under §122.45(i); pollutants in intake water for net limitations under §122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under §122.45(e); pollutants subject to notification requirements under §122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters or required under 40 CFR chapter I, subchapter N or O.

(A) For the purposes of this paragraph, a method is "sufficiently sensitive" when:

(*1*) The method minimum level (ML) is at or below the level of the effluent limit established in the permit for the measured pollutant or pollutant parameter; or

(2) The method has the lowest ML of the analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O for the measured pollutant or pollutant parameter.

NOTE TO PARAGRAPH (i)(1)(iv)(A): Consistent with 40 CFR part 136, applicants or permittees have the option of providing matrix or sample specific minimum levels rather than the published levels. Further, where an applicant or permittee can demonstrate that, despite a good faith effort to use a method that would otherwise meet the definition of "sufficiently sensitive", the analytical results are not consistent with the QA/QC specifications for that method, then the Director may determine that the method is not performing adequately and the Director should select a different method from the remaining EPA-approved methods that is sufficiently sensitive consistent with 40 CFR 122.44(i)(1)(iv)(A). Where no other EPA-approved methods exist, the Director should select a method consistent with 40 CFR 122.44(i)(1)(iv)(B).

(B) In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters.

(2) Except as provided in paragraphs (i)(4) and (5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year. All results must be electronically reported in compliance with 40 CFR part 3 (including, in all cases, subpart D to part 3), §122.22, and 40 CFR part 127.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with §122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under §122.41(l) (1), (4), (5), and (6) at least annually.

(j) *Pretreatment program for POTWs.* Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) *Best management practices (BMPs)* to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. These and other EPA guidance documents can be obtained through the National Service Center for Environmental Publications (NSCEP) at *http://www.epa.gov/nscep*. In addition, States may have BMP guidance documents. These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(l) *Reissued permits.* (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under §122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions—A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if—

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(*1*) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(*2*) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) *Limitations.* In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) *Privately owned treatment works.* For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) *Grants.* Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) *Sewage sludge.* Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) *Coast Guard.* When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) *Navigation.* Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with §124.59 of this chapter.

(r) *Great Lakes.* When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) *Qualifying State, Tribal, or local programs.* (1) For storm water discharges associated with small construction activity identified in §122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in §122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

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